

Before the  
 FEDERAL COMMUNICATIONS COMMISSION  
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
 OFFICE OF THE SECRETARY

In the Matter of

REEXAMINATION OF THE POLICY STATEMENT  
 ON COMPARATIVE BROADCAST HEARINGS

) GC Docket No. 92-52  
 RM-7739  
 RM-7740  
 RM-7741

To: The Commission

Reply Comments  
Of Evergreen Communications Company

EVERGREEN COMMUNICATIONS COMPANY ("ECC"), pursuant to Section 1.415(c) of the Commission's Rules, 47 C.F.R. § 1.415(c), hereby submits its reply comments in response to the Commission's Notice of Proposed Rulemaking in GC Docket No. 92-52, 8 FCC Rcd 5475 (1993), and the comments addressed thereto.<sup>1/</sup>

1. ECC is an applicant for construction permit for a new FM station at Evergreen, Colorado, File No. BPCT-821217BC. By Memorandum Opinion and Order, the Commission granted ECC's application for the Evergreen facility. Evergreen Broadcasting Company, 6 FCC Rcd 5599 (1991), recon. den., 7 FCC Rcd 6601 (1992), appeal lodged sub nom. Evergreen Broadcasting Company II v. F.C.C., No. 91-1511 et al. The U.S. Court of Appeals for the District of Columbia Circuit has remanded the matter to the Commission for consideration of a settlement in which (1) the Commission grants ECC's application (2) dismisses all competing applications and (3)

<sup>1/</sup> ECC's Reply Comments are timely filed. See, Order, DA 93-1064, released September 1, 1993.

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approves the reimbursement of expenses of the remaining competing applicants . Evergreen Broadcasting Company II v. F.C.C. (Order), released October 14, 1993.

*Retroactive Application Of Holding Periods  
Would Be Arbitrary and Capricious And Not Withstand Judicial Review.*

2. ECC opposes the retroactive application of any three-year (or other mandatory holding period) adopted by the Commission as a result of this rulemaking and supports the comments of parties who have opposed such retroactive action. Among others, New Miami Latino Broadcasting Corporation ("New Miami Latino"); Rex Broadcasting Corporation; Susan M. Bechtel ("Bechtel"); the Federal Communications Bar Association ("FCBA"); August Communications, Inc. and John W. Barger; and Reed, Smith, Shaw & McClay ("Reed") correctly have noted the harm to be done by retroactive application of any newly-adopted holding period.

3. Retroactivity in formal rulemaking proceedings is inherently suspect. Bowen v. Georgetown University Hospital, 488 U.S. 203 (1988). Nothing in either the Communications Act or the Administrative Procedure Act would support a retroactive application of any required holding period on existing broadcast station applicants, licensees and permittees. Such specific statutory authority would be required for there to be a retroactive application of any holding period.<sup>27</sup> As the Supreme Court noted in

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<sup>27</sup> In Maxcell Telecom Plus, Inc. v. F.C.C., 815 F.2d 1551 (D.C. Cir. 1987), which was decided before Bowen, the D.C. Circuit was able to discern sufficient Congressional intent in the adoption of (continued...)

Bowen:

It is axiomatic than an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.

Id. at 208. As Bechtel has correctly noted (Comments, p. 1), there is no specific authority, either in Section 303(r) of the Act, 47 U.S.C. § 303(r), governing rulemaking powers, nor in the broadcast licensing provisions, Sections 307-309, 47 U.S.C. §§ 307-309, to justify the retroactive imposition of holding periods to existing licenses and permits obtained through the comparative hearing process.

4. Further, such retroactive application of rules is specifically prohibited by the Administrative Procedure Act, as noted by New Miami Latino (p. 3) and Bechtel (p. 2). The APA specifically defines a "rule" as an agency statement "of general or particular applicability and future effect." 5 U.S.C. § 551(4) (emphasis supplied). See also Bowen, *supra*, 488 U.S. at 218 (J.

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<sup>2/</sup>(...continued)

the lottery statute, 47 U.S.C. § 309(i), to justify retroactive imposition of the lottery procedures for selection of cellular telephone applicants that had originally been filed in anticipation of comparative hearings. 815 F.2d at 1555. This is a limited exception because of the specific Congressional intent to employ lottery procedures to eliminate application backlogs, *inter alia*. Id. Moreover, there was no imposition of any obligation or liability nor the deprivation of any rights as a result of the change from comparative hearing to lottery selection procedures. By contrast, especially in the case of parties such as ECC that have incurred substantial obligations to settle a contested proceeding and speed inauguration of radio service to Evergreen, Colorado (the comparative proceeding has lasted nearly 11 years), such an obligation might cause substantial financial hardship. Reed's Comments (pp. 9-11) in particular set forth examples of the hardship that could be caused by retroactive application and enforcement of any holding period.

Scalia Concurring). Such retroactive application of any holding period to existing permittees and licensed stations when the rule is adopted would amount to what Justice Scalia characterized as "secondary retroactivity", i.e., "altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule..." *Id.*, 488 U.S. at 220 (J. Scalia Concurring). Although in this case, retroactive application of a holding period to existing permittees and licensed stations might not render an investment "worthless," it would still impose retroactively a substantial regulatory burden, with attendant financial costs, upon parties who had made financial decisions in reliance upon rules and policies then in effect. Such retroactivity is prohibited by the APA.

*Application Of The Holding Period To Cases Decided  
By Settlement Would Deter Future Settlement Of Contested Cases.*

5. Reed (Comments, p. 7) and FCBA (Comments, p. 4) in particular have noted the deterrent to settlements that would result from application of any holding period to cases resolved through a settlement. The Commission should not extend a holding period of any kind to cases decided as a result of a settlement. ECC submits that such a rule could well have precluded the settlement of the Evergreen proceeding. Although ECC was confident of the Commission's ability to prevail upon the appeal of the decisions that awarded the construction permit to ECC, see Evergreen Broadcasting, *supra*, ECC concluded that a settlement would bring certainty into play by allowing for immediate

resolution of an 11-year old case, more rapid inauguration of delayed service, and conservation of resources of the parties involved, including the Commission, that otherwise would be spent in further litigation before the Court of Appeals. See, "Joint Request for Approval of Settlement," filed September 22, 1993 by ECC and other parties to the case. ECC is required to pay substantial sums under the settlement agreements already approved, as well as those now awaiting approval, by the Commission. Although ECC is confident of the likely success of its station, ECC's financial burdens are substantial and could be impaired by something such as a downturn in the economy.

6. Although proponents of holding periods, such as Black Citizens for a Fair Media, et al. ("BCFM") state that exceptions could be made to the holding period, neither the listening public nor the Commission would benefit from having to process numerous requests for waiver of a holding period.<sup>3/</sup> If a licensee were in

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<sup>3/</sup> BCFM's analysis of supposed instability in broadcasting, particularly such instability's having been caused by "trafficking" in station licensees, results from a tunnel-visioned view of the market as inherently bad. BCFM's solution is a holding period that would last for the length of a license term. The Commission should reject the BCFM proposal.

BCFM sees the license term holding period as a solution to what it considers industry "instability." BCFM overlooks the negative effect on the value of radio broadcasting stations caused by the 600+ new allocations of stations in the 1980s, including many in major cities and immediately surrounding areas, from which many BCFM members benefitted (through outright license grants or settlements) because of the Commission's progressive licensing policies. The *post hoc ergo propter hoc* logic of BCFM also ignores the impact of discrete things such as tax policy and changes in the economy, which in turn, also impacted on the value of stations.

the future not able to make its financial ends meet, the public interest would be better served by having a better capitalized buyer enter the market than have a station go dark for a long period of time while it attempts to obtain a waiver of a Commission holding period.

*Conclusion*

7. If the Commission ultimately chooses to adopt a mandatory holding period longer than 1 year for authorizations obtained through the comparative process, such a modified holding period should be limited to two years, as proposed by FCBA. BCFM's proposed license-term holding period is unrealistic and would substantially harm the public interest.

8. However, whatever additional holding period is ultimately adopted should not be applied retroactively. Further, the Commission should not extend its holding period rule to cases resolved through settlement.

Respectfully submitted,

EVERGREEN COMMUNICATIONS COMPANY



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